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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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REVERGE ANSELMO and SEVEN
HILLS LAND AND CATTLE COMPANY,
LLC,

NO. CIV. 2:12-1422 WBS EFB

Plaintiffs,

ORDER RE: MOTION TO REMAND,
MOTIONS TO DISMISS, MOTION TO
STRIKE, MOTIONS FOR SANCTIONS,
AND MOTION REGARDING MEDIATION
CONFIDENTIALITY

v.

RUSS MULL, LESLIE MORGAN, a
Shasta County Assessor-
Recorder, COUNTY OF SHASTA,
BOARD OF SUPERVISORS OF THE
COUNTY OF SHASTA, LES BAUGH
and GLEN HAWES,

Defendants.

COUNTY OF SHASTA, AND COUNTY
OF SHASTA, for the People of
the State of California,

Cross-Complainant,

v.

REVERGE ANSELMO; SEVEN HILLS
LAND AND CATTLE COMPANY LLC;
NANCY HALEY; MATTHEW RABE;
MATTHEW KELLEY; ANDREW JENSEN;
and ROES 1 THRU 50,

1 Cross-Defendants.

2 _____/
3 -----oo0oo-----

4 I. Factual and Procedural Background

5 Plaintiffs Reverage Anselmo and Seven Hills Land and
6 Cattle Company initiated this action in state court on October 6,
7 2008, against defendants Shasta County, the Board of Supervisors
8 of the County of Shasta, and Shasta County officials Russ Mull,
9 Leslie Morgan, Les Baugh, and Glen Hawes. In their Third Amended
10 Complaint ("TAC"), plaintiffs allege claims against Shasta County
11 and its employees under 42 U.S.C. § 1983. Plaintiffs' claims
12 arise from defendants' alleged wrongful interference with
13 plaintiffs' use of their land. Plaintiffs allege that county
14 officials engaged in a variety of wrongful conduct that
15 interfered with plaintiffs' use of their property, such as
16 issuing wrongful notices of grading violations, filing false
17 reports with various officials and agencies, requiring an
18 unnecessary environmental impact study, interfering with
19 plaintiffs' development of their winery, and wrongfully denying
20 plaintiffs' application for a Williamson Act contract. (Third
21 Am. Compl. ("TAC") ¶¶ 23, 27, 30, 40, 44-58) (Docket No. 1, Ex.
22 B).)

23 Plaintiffs further allege that as part of the county
24 officials' campaign against them, Andrew Jensen, an employee
25 of the California Regional Water Quality Control Board, attempted
26 to intimidate Anselmo by soliciting governmental agencies
27 including the United States Army Corps of Engineers ("Army
28 Corps") to "obtain assertions of violations of other laws" in

1 order to "create a 'piling on' condition" that deprived
2 plaintiffs of their right to use their property. (Id. ¶ 28.)
3 Plaintiffs and Jensen reached a settlement, and plaintiffs
4 dismissed their claims against him with prejudice on June 25,
5 2009. (Docket No. 68-2.)

6 While the case was still pending in state court, Shasta
7 County initiated cross-claims against plaintiffs and third-party
8 claims against Jensen and three employees of the Army Corps. The
9 Attorney General certified the case under the Westfall Act, 28
10 U.S.C. § 2697, and thus the United States removed the action to
11 federal court pursuant to 28 U.S.C. § 1442(a) and § 2679(d)(2) on
12 May 25, 2012. The court denied Shasta County's motion to
13 challenge the Attorney's General certification without prejudice.
14 (Docket No. 31.)

15 Currently before the court are (1) plaintiffs' motion
16 to remand the case to state court; (2) plaintiffs' motion for
17 sanctions against Shasta County pursuant to Federal Rule of Civil
18 Procedure 11; (3) plaintiffs' motion to dismiss Shasta County's
19 cross-claims for lack of subject matter jurisdiction pursuant to
20 Rule 12(b)(1) and for failure to state a claim upon which relief
21 can be granted pursuant to Rule 12(b)(6); (4) Jensen's motion to
22 dismiss Shasta County's third-party claims pursuant to Rule
23 12(b)(6); (5) Jensen's motion to strike Shasta County's third-
24 party claims pursuant to Rule 12(f); and (6) Shasta County's
25 motion for an order precluding plaintiffs from further violations
26 of a mediation confidentiality agreement and for monetary
27 sanctions.

28 ///

1 II. Discussion

2 A. Motion to Remand

3 The United States removed this action from state court
4 pursuant to 28 U.S.C. § 1442(a) and § 2679(d)(2) after Shasta
5 County filed third-party claims against three employees of the
6 Army Corps. In removing the action, the Attorney General
7 certified under the Westfall Act, § 2697(d)(2), that the Army
8 Corps employees were acting within the scope and course of their
9 employment at the time of the alleged conduct, and the United
10 States was substituted as the defendant in place of the Army
11 Corps employees. Shasta County challenged the Attorney General's
12 certification, and the court denied the challenge without
13 prejudice to it being raised based on new discovery or
14 allegations. (Docket No. 31.) In a separate Order, the court
15 granted the United States' Rule 12(b)(6) motion to dismiss Shasta
16 County's claims against it because the § 1983 claims under which
17 Shasta County sought contribution could not be brought against
18 the United States. (Docket No 33.) After Shasta County failed
19 to file an amended third-party complaint against the United
20 States within the time provided, the court dismissed Shasta
21 County's third-party claims against the United States with
22 prejudice.¹ (Docket No. 58.)

23
24 ¹ The proposed order granting dismissal with prejudice
25 was submitted by the United States and included dismissal of the
26 claims against the Army Corps employees with prejudice. As the
27 United States had been substituted as the defendant and the
28 motion to dismiss and grant of leave to file an amended complaint
was limited to the claims against the United States, it was never
the court's intention to dismiss any claims against the Army
Corps employees with prejudice. The dismissal with prejudice in
Docket No. 58 is therefore limited to Shasta County's claims

1 Because the sole basis for removal was the claims
2 against the Army Corps employees to which the United States was
3 substituted as the defendant and the claims against the United
4 States have been dismissed with prejudice, plaintiffs now seek to
5 remand the action to state court pursuant to § 1447(c).

6 Section 2679(d)(2) of the Westfall Act provides that
7 the certification of the Attorney General pursuant to that
8 subsection "shall conclusively establish scope of office or
9 employment for purposes of removal." 28 U.S.C. § 2679(d)(2).

10 The Supreme Court has interpreted this provision to mean that,
11 once the Attorney General certifies scope of employment under §
12 2679(d)(2) and triggers removal of the case to federal court, "§
13 2679(d)(2) renders the federal court exclusively competent and
14 categorically precludes a remand to the state court." Osborn v.
15 Haley, 549 U.S. 225, 243 (2007).

16 In Osborn, the United States removed a case to federal
17 court after the Attorney General certified that the federal
18 employee defendant was acting within the scope of his employment.
19 After removal, the plaintiff successfully challenged the Westfall
20 Act certification and the court denied the United States' motion
21 to be substituted as the defendant and remanded the case to state
22 court. The Supreme Court held that § 1447(c) did not bar review
23 of the district court's order remanding the case and held that §
24 2697(d)(2) precluded the district court from remanding the case.

25 Given the fact that the remand in Osborn occurred after
26 the district court rejected the Attorney General's certification,

27 _____
28 against the United States.

1 the Court's analysis at times appears limited to precluding
2 remand under similar circumstances: "Congress gave district
3 courts no authority to return cases to state courts on the ground
4 that the Attorney General's certification was unwarranted";
5 "[w]ere it open to a district court to remand a removed action on
6 the ground that the Attorney General's certification was
7 erroneous, the final instruction in § 2679(d)(2) would be
8 weightless." Id. at 241-42 (emphasis added).

9 In contrast to this potentially limiting language,
10 other statements in the opinion unconditionally limit a court's
11 ability to remand a case removed pursuant to § 2679(d)(2):

12 [W]hen the Attorney General certifies scope of
13 employment, triggering removal of the case to a federal
14 forum[,] . . . § 2679(d)(2) renders the federal court
15 exclusively competent and categorically precludes a
16 remand to the state court. . . . Our decision . . .
17 leaves the district court without authority to send a
18 certified case back to the state court. . . . [T]he
19 Westfall Act's command that a district court retain
20 jurisdiction over a case removed pursuant to § 2679(d)(2)
21 does not run afoul of Article III.

22 Id. at 243-45.

23 When the Attorney General's certification is not
24 challenged and the claims against the United States are
25 subsequently dismissed, district courts have reached different
26 conclusions as to whether Osborn's ban on remand applies. In
27 Kebaish v. Inova Health Care Services, 731 F. Supp. 2d 483 (E.D.
28 Va. 2010), the plaintiff voluntarily dismissed its claims against
the United States after it had been substituted as the defendant
under the Westfall Act and the case had been removed from state
court. The court reasoned that the factual differences between
the case before it and Osborn were not material because "Osborn

1 holds that § 2679(d)(2) provides a conclusive basis for federal
2 subject matter jurisdiction in all cases, regardless of whether
3 certification is ultimately upheld." Kebaish, 731 F. Supp. 2d at
4 487; accord Boggs-Wilkerson v. Anderson, Civ. No. 2:10-518, 2011
5 WL 6934598, at *2 (E.D. Va. Nov. 17, 2011).

6 On the other hand, a district court reached the
7 opposite result in Salazar v. PCC Community Wellness Center, Civ.
8 No. 08-1764, 2010 WL 391383 (N.D. Ill. Jan. 29, 2010). In that
9 case, the plaintiff similarly dismissed the claims against the
10 United States after the case had been removed from state court
11 and the United States had been substituted as the defendant under
12 the Westfall Act. The court emphasized the limiting language in
13 Osborn that "district courts have no authority to return cases to
14 state courts based on the district [']court's disagreement with
15 the Attorney General's scope-of-employment determination."
16 Salazar, 2010 WL 391383, at *3 (quoting Osborn, 549 U.S. at 227).

17 Limiting Osborn to cases in which the Westfall Act
18 certification is rejected is consistent with the language of §
19 2679(d)(2) and some of the Court's statements in Osborn.
20 Nonetheless, remanding this case based on the difference between
21 it and Osborn, would be difficult, if not impossible, to
22 reconcile with the Court's unconditional and sweeping
23 pronouncement that § 2679(d)(2) "categorically precludes a remand
24 to the state court." Osborn, 549 U.S. at 243.

25 Remanding this case could also conflict with §
26 2679(d)(2)'s aim of "'foreclos[ing] needless shuttling of a case
27 from one court to another.'" Id. at 242 (quoting Gutierrez de
28 Martinez v. Lamagno, 515 U.S. 417, 433, n.10 (1995)). Here, the

1 court denied Shasta County's challenge to the Attorney General's
2 certification under § 2679(d) (2), but did so without prejudice to
3 Shasta County renewing its challenge in light of new allegations
4 or evidence. Assuming Shasta County challenges the Attorney
5 General's certification at a later date, it appears that only the
6 federal court could resolve that challenge. See Stewart v. State
7 Crop Pest Comm'n, 414 S.E.2d 121, 124 (S.C. 1992) ("[T]he
8 Attorney General's certification is not reviewable by the state
9 court."); cf. Meridian Int'l Logistics, Inc. v. United States,
10 939 F.2d 740, 744-45 (9th Cir. 1991) (holding that, even though §
11 2679(d) (2) "is silent on the capacity of the district court to
12 review scope certifications . . . district courts may review the
13 Attorney General's scope determinations").²

14 Accordingly, because this action was removed based on
15 the Attorney General's Westfall Act certification under §
16 2697(d) (2), the court must deny plaintiffs' motion to remand, and
17 plaintiffs' request for costs under § 1447(c) is moot. Moreover,
18 even if Osborn is limited to precluding remand only after a
19 successful challenge to Westfall Act certification, the court can
20 properly retain jurisdiction of this case based on plaintiffs' §
21 1983 claims.

22
23 ² The court was unable to find a single decision by a
24 California state court addressing a challenge to certification
25 under § 2679(d) (2) or the Westfall Act. When the search extended
26 beyond California, the court found a very limited number of state
27 court decisions addressing certification, but they were limited
28 to the Attorney General's decision not to certify under the
Westfall Act. E.g., Jaskolski v. Daniels, 905 N.E.2d 1, 12-13
(Ind. App. 2009) ("[T]he Westfall Act does not grant to the
federal courts exclusive jurisdiction to review the U.S. Attorney
General's decision not to certify a purported federal employee
under the Act.").

1 B. Plaintiffs' Rule 11 Motion Against Shasta County

2 Plaintiffs request that the court impose Rule 11
3 sanctions against Shasta County based on its addition of the Army
4 Corps employees in its FACC and the resulting delay and removal
5 to federal court that those third-party claims caused. Rule
6 11(c) provides for the imposition of sanctions if Rule 11(b) is
7 violated, and thus sanctions are appropriate "when a filing is
8 frivolous, legally unreasonable, or without factual foundation,
9 or is brought for an improper purpose." Simpson v. Lear
10 Astronics Corp., 77 F.3d 1170, 1177 (9th Cir. 1996). While
11 imposing sanctions under the court's inherent power requires a
12 finding of bad faith, the imposition of Rule 11 sanctions
13 requires only a showing of objectively unreasonable conduct. In
14 re DeVille, 361 F.3d 539, 548 (9th Cir. 2004).

15 Rule 11(c)(2)'s "safe harbor provision requires parties
16 filing such motions to give the opposing party 21 days first to
17 'withdraw or otherwise correct' the offending paper." Holgate v.
18 Baldwin, 425 F.3d 671, 678 (9th Cir. 2005). The court
19 "enforce[s] this safe harbor provision strictly[] [and] must
20 reverse the award of sanctions when the challenging party failed
21 to comply with the safe harbor provisions, even when the
22 underlying filing is frivolous." Id. Plaintiffs do not indicate
23 that they complied with the safe harbor provision, and counsel
24 for Shasta County indicates in a declaration that plaintiffs'
25 Rule 11 motion was not served on Shasta County before it was
26 filed with the court. (Docket No. 64-1 at ¶ 2.) Accordingly,
27 the court must deny plaintiffs' motion for Rule 11 sanctions.
28 Moreover, the court is not inclined to take the parties'

1 invitation to weed through their obvious frustrations with each
2 other and be sidetracked from the timely resolution of this case
3 on the merits. Likewise, the court also denies Shasta County's
4 request for costs as sanctions against plaintiffs for filing the
5 Rule 11 motion.

6 C. Plaintiffs' Motion to Dismiss

7 1. Rule 12(b)(1) Motion

8 Plaintiffs first move to dismiss Shasta County's FACC
9 for lack of subject matter jurisdiction pursuant to Rule
10 12(b)(1). On a motion to dismiss under Rule 12(b)(1), the
11 plaintiff bears the burden of establishing a jurisdictional basis
12 for its claim. Kokkonen v. Guardian Life Ins. Co. of Am., 511
13 U.S. 375, 377 (1994). Because "[f]ederal courts are courts of
14 limited jurisdiction" that "possess only that power authorized by
15 Constitution and statute," id., a court must dismiss claims over
16 which it has no jurisdiction. Fed. R. Civ. P. 12(h)(3).

17 Pursuant to 28 U.S.C. § 1367(a), "district courts shall
18 have supplemental jurisdiction over all other claims that are so
19 related to claims in the action within such original jurisdiction
20 that they form part of the same case or controversy under Article
21 III of the United States Constitution." 28 U.S.C. § 1367(a). "A
22 state law claim is part of the same case or controversy when it
23 shares a 'common nucleus of operative fact' with the federal
24 claims and the state and federal claims would normally be tried
25 together." Bahrampour v. Lampert, 356 F.3d 969, 978 (9th Cir.
26 2004).

27 Without belaboring the allegations in the TAC and FACC,
28 it is readily apparent that Shasta County's claims for nuisance

1 abatement and violations of California Civil Code section 17200
2 share a common nucleus of operative fact with plaintiffs' § 1983
3 claims. The claims attempt to resolve disputes regarding
4 plaintiffs' use of their property, including their grading of the
5 ranch property, development of their winery and restaurant, and
6 their Williamson Act contract. Moreover, the Supreme Court has
7 held that, in cases removed under § 28 U.S.C. § 2679(d)(2), "even
8 if only state-law claims remained after resolution of the federal
9 question, the District Court would have discretion, consistent
10 with Article III, to retain jurisdiction." Osborn, 549 U.S. at
11 245. Accordingly, the court will deny plaintiffs' motion to
12 dismiss the cross-claims against them in the TACC for lack of
13 subject matter jurisdiction.

14 2. Rule 12(b)(6) Motion

15 Plaintiffs next move to dismiss Shasta County's
16 nuisance abatement and section 17200 claims pursuant to Rule
17 12(b)(6) for failure to state a claim upon which relief can be
18 granted. On a motion to dismiss, the court must accept the
19 allegations in the complaint as true and draw all reasonable
20 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416
21 U.S. 232, 236 (1974), overruled on other grounds by Davis v.
22 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322
23 (1972). "To survive a motion to dismiss, a complaint must
24 contain sufficient factual matter, accepted as true, to 'state a
25 claim to relief that is plausible on its face.'" Ashcroft v.
26 Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v.
27 Twombly, 550 U.S. 544, 570 (2007)). This "plausibility
28 standard," however, "asks for more than a sheer possibility that

1 a defendant has acted unlawfully," and "[w]here a complaint
2 pleads facts that are 'merely consistent with' a defendant's
3 liability, it 'stops short of the line between possibility and
4 plausibility of entitlement to relief.'" Id. (quoting Twombly,
5 550 U.S. at 556-57).³

6 a. Nuisance Abatement Claim

7 Plaintiffs contend that Shasta County fails to plead a
8 cognizable claim for nuisance abatement because California law
9 requires that, "when there is an administrative proceeding
10 available to determine that a public or private nuisance
11 condition exists, it is necessary to allege that proceeding has
12 been employed and a nuisance has been declared after hearing in
13 compliance with due process." (Pls.' Mot. to Dismiss 6:1-5
14 (Docket No. 37).) Plaintiffs do not provide any controlling
15 authority giving rise to such an obligation.

16 When addressing then-existing immunity law for
17 legislative bodies in 1958, the California Supreme Court
18 discussed a requirement that "a legislative body has declared the
19 condition complained of to be a nuisance" in order to assert an
20 "exception to the immunity doctrine where a governmental unit is
21 maintaining a nuisance." Vater v. Glenn County, 49 Cal. 2d 815,
22 820 (1958) (emphasis added). Similarly, Mulloy v. Sharp Park

23
24 ³ "When ruling on a motion to dismiss, [the court] may
25 generally consider only allegations contained in the pleadings,
26 exhibits attached to the complaint, and matters properly subject
27 to judicial notice." Colony Cove Props., LLC v. City of Carson,
28 640 F.3d 948, 955 (9th Cir. 2011) (internal quotation marks
omitted). The court will take judicial notice of the Shasta
County Code. Id. n.4. The court need not rely on any of the
other extraneous documents submitted in plaintiffs' request for
judicial notice, and thus denies plaintiffs' request as moot.

1 Sanitary District, 164 Cal. App. 2d 438 (1st Dist. 1958), relied
2 on Vater in requiring a plaintiff to "show that a legislative
3 body has declared the condition complained of to be a nuisance"
4 in order to bring a claim against a "governmental unit . . . for
5 creating and maintaining a nuisance." Mulloy, 164 Cal. App. 2d
6 at 441 (emphasis added). Even assuming these cases are still
7 good law, they do not impose a requirement that an administrative
8 body declare that conduct by an individual amounts to a nuisance
9 before the county can bring a nuisance claim against the
10 individual.

11 Contrary to plaintiffs' theory, the Shasta County Code
12 contemplates the county asserting a nuisance abatement claim as
13 it has in its TAAC. Shasta County Code section 8.28.010
14 provides, "Every violation of any regulatory or prohibitory
15 provision contained in Division 4 or 18 of the Food and
16 Agricultural Code of the State of California, or of this Code, is
17 expressly declared to be a public nuisance." Shasta County Code
18 § 8.28.010. California courts recognize that "nuisance per se
19 arises when a legislative body with appropriate jurisdiction, in
20 the exercise of the police power, expressly declares a particular
21 object or substance, activity, or circumstance, to be a nuisance"
22 and have upheld injunctive relief against a nuisance per se based
23 on a violation of a municipal code. City of Claremont v. Kruse,
24 177 Cal. App. 4th 1153, 1163-66 (2d Dist. 2009) (internal
25 quotation marks omitted).

26 Although the Shasta County Code provides procedures for
27 a hearing to address a nuisance, it does not establish that a
28 hearing is a prerequisite to a civil action and contemplates the

1 county's initiation of civil actions to resolve an alleged
2 nuisance. See Shasta County Code § 8.28.020 ("The board of
3 supervisors on its own motion or an enforcing officer may invoke
4 the provisions of this chapter in lieu of or in addition to
5 instituting civil enforcement proceedings or a criminal
6 prosecution as to any violation of this code that has occurred or
7 is occurring or as to any other nuisance."), § 8.28.070 ("This
8 chapter is an alternative to and does not supersede any other
9 provision of law that authorizes a nuisance to be abated or
10 enjoined."), § 8.28.030(C) ("The failure of any person to receive
11 a notice given pursuant to subsection B of this section shall not
12 constitute grounds for any court to invalidate any subsequent
13 action by the county or any of its officers, agents or employees
14 to abate the nuisance.").

15 While California Government Code section 25845 provides
16 for minimum requirements for an ordinance that establishes the
17 procedures for abatement of a nuisance, it neither requires
18 counties to enact an ordinance nor precludes an ordinance from
19 providing for judicial remedies in lieu of administrative
20 remedies. See Cal. Gov't Code § 25845(a). Similarly, section
21 51250 outlines procedures to address material breaches of a
22 Williamson Act contract, but expressly provides that the remedy
23 provided for in the section "is in addition to any other
24 available remedies for breach of contract." Cal. Gov't Code §
25 51250(a); see also id. ("Except as expressly provided in this
26 section, this section is not intended to change the existing land
27 use decisionmaking and enforcement authority of cities and
28 counties including the authority conferred upon them by this

1 chapter to administer agricultural preserves and contracts.”).⁴

2 Plaintiffs’ reliance on the primary jurisdiction
3 doctrine is also misplaced. “The doctrine of primary
4 jurisdiction, like the rule requiring exhaustion of
5 administrative remedies, is concerned with promoting proper
6 relationships between the courts and administrative agencies
7 charged with particular regulatory duties.” United States v. W.
8 Pac. R. Co., 352 U.S. 59, 63 (1956). The doctrine “applies where
9 a claim is originally cognizable in the courts, and comes into
10 play whenever enforcement of the claim requires the resolution of
11 issues which, under a regulatory scheme, have been placed within
12 the special competence of an administrative body; in such a case
13 the judicial process is suspended pending referral of such issues
14 to the administrative body for its views.” Id. at 63-64. It is
15 a prudential doctrine that “can be used, in instances where the
16 federal courts do have jurisdiction over an issue, but decide

17
18 ⁴ The court previously rejected plaintiffs’ reliance on
19 section 51250 in their related case:

20 With respect to plaintiffs’ allegation that they were
21 entitled to a notice and hearing under the terms of the
22 Williamson Act before defendants determined that the
23 chapel was not a compatible use[,] . . . [t]he second
24 Williamson Act provision plaintiffs cite, Cal. Gov’t Code
25 § 51250, provides that a landowner may request a public
26 hearing upon receiving notice that the city or county
administering the Williamson Act contract has determined
that the landowner is likely in material breach.
Plaintiffs do not allege, however, that they ever
demanded a public hearing. Neither provision, therefore,
suggests that plaintiffs were entitled to a notice and
hearing under state law.

27 Anselmo v. County of Shasta, --- F. Supp. 2d ----, ----, 2012 WL
28 2090437, at *n.5 (E.D. Cal. June 8, 2012).

1 that a claim 'requires resolution of an issue of first
2 impression, or of a particularly complicated issue that Congress
3 has committed to a regulatory agency.'" GCB Commc'ns, Inc. v.
4 U.S. S. Commc'ns, Inc., 650 F.3d 1257, 1264 (9th Cir. 2011).
5 Plaintiffs have not sufficiently articulated, and the court
6 cannot surmise, any issues that require resolution by an
7 administrative body, why special competence is needed, or what
8 administrative body possesses that competence.

9 The remainder of plaintiffs' arguments attack the
10 merits of the parties' claims, not the sufficiency of the
11 allegations in the TACC, and cannot be resolved in a Rule
12 12(b)(6) motion. Because Shasta County sufficiently alleges a
13 nuisance abatement claim, the court will deny plaintiffs' motion
14 to dismiss that claim.

15 b. UCL Claim

16 California's UCL prohibits "any unlawful, unfair or
17 fraudulent business act or practice" Cal. Bus. & Prof.
18 Code § 17200. Because counties are not "persons" as defined in
19 the UCL, see id. § 17201, section 17204 of the UCL authorizes
20 counties to bring a UCL claim under limited circumstances,
21 including a case brought "by a county counsel authorized by
22 agreement with the district attorney in actions involving
23 violation of a county ordinance." Id. § 17204; see generally
24 Cnty. of Santa Clara v. Astra U.S., Inc., 428 F. Supp. 2d 1029,
25 1033-36 (N.D. Cal. 2006).

26 In its TACC, Shasta County alleges that "Cross-
27 Complainant County of Shasta, for the People of the State of
28 California, prior to filing this Cross-Complaint for violation of

1 Business and Professions Code Section 17200 et seq., have the
2 authorization by agreement with the District Attorney of the
3 County of Shasta to bring this cause of action." (TACC ¶ 27.)
4 Plaintiffs' contend that section 17204 requires county counsel,
5 not the county itself, to assert the UCL claim on behalf of the
6 people of the state. Neither section 17204 nor the cases
7 applying it appear to contemplate that county counsel would be
8 the named representative. See generally Cnty. of Santa Clara,
9 428 F. Supp. 2d at 1033-36. The court will accordingly deny
10 plaintiffs' motion to dismiss Shasta County's UCL claim.

11 D. Jensen's Motions to Dismiss and Strike

12 Jensen moves to dismiss Shasta County's claims for
13 contribution and indemnification pursuant to Rule 12(b)(6) on the
14 ground that § 1983 does not provide for either claim. The Ninth
15 Circuit has stated that "[t]here is no federal right to
16 indemnification provided in 42 U.S.C. § 1983." Allen v. City of
17 Los Angeles, 92 F.3d 842, 845 n.1 (1996), overruled on other
18 grounds, Acri v. Varian Assocs., Inc., 114 F.3d 999 (9th Cir.
19 1997).

20 "Typically, a right to contribution is recognized when
21 two or more persons are liable to the same plaintiff for the same
22 injury and one of the joint tortfeasors has paid more than his
23 fair share of the common liability." Nw. Airlines, Inc. v.
24 Transport Workers Union of Am., 451 U.S. 77, 87-88 (1981).
25 However, "[a]t common law there was no right to contribution
26 among joint tortfeasors." Id. at 87. Thus, "a right to
27 contribution may arise in either of two ways: first, through the
28 affirmative creation of a right of action by Congress, either

1 expressly or by clear implication; or, second, through the power
2 of federal courts to fashion a federal common law of
3 contribution." Tx. Indus., Inc. v. Radcliff Materials, Inc., 451
4 U.S. 630, 638 (1981).

5 The text of § 1983 does not provide for a right to
6 contribution,⁵ and Shasta County has not identified any statement
7 in its legislative history that suggests Congress intended for
8 such a right to exist. Although the Supreme Court has not
9 addressed whether federal courts have the power to create a right
10 to contribution under § 1983, it has unequivocally held that
11 courts lack the power to do so under Title VII, the Equal Pay
12 Act, and federal securities law. Nw. Airlines, Inc., 451 U.S. at
13 98; Tx. Indus., Inc., 451 U.S. at 645; see also Smart v. Int'l
14 Broth. of Elec. Workers, Local 702, 315 F.3d 721, 727 (7th Cir.
15 2002) ("[I]n the more than two decades since the Northwest
16 Airlines decision, the Supreme Court has become ever more

17
18 ⁵ The entirety of § 1983 states:

19 Every person who, under color of any statute, ordinance,
20 regulation, custom, or usage, of any State or Territory
21 or the District of Columbia, subjects, or causes to be
22 subjected, any citizen of the United States or other
23 person within the jurisdiction thereof to the deprivation
24 of any rights, privileges, or immunities secured by the
25 Constitution and laws, shall be liable to the party
26 injured in an action at law, suit in equity, or other
27 proper proceeding for redress, except that in any action
28 brought against a judicial officer for an act or omission
taken in such officer's judicial capacity, injunctive
relief shall not be granted unless a declaratory decree
was violated or declaratory relief was unavailable. For
the purposes of this section, any Act of Congress
applicable exclusively to the District of Columbia shall
be considered to be a statute of the District of
Columbia.

1 reluctant to imply private rights of action”).

2 Often relying on Northwest Airlines and Texas
3 Industries, the vast majority of federal courts that have
4 addressed the issue have concluded that § 1983 does not provide
5 for a contribution or indemnity claim. See, e.g., AE ex rel.
6 Hernandez v. Portillo, Civ. No. 1:09-2204 LJO DLB, 2011 WL
7 3740829, at *8 (E.D. Cal. Aug. 24, 2011) (indemnity); Hurley v.
8 Horizon Project, Inc., Civ. No. 08-1365, 2009 WL 5511205, at *2-5
9 (D. Or. Dec. 3, 2009) (contribution) (citing cases); Banks v.
10 City of Emeryville, 109 F.R.D. 535, 539 (N.D. Cal. Aug. 27, 1985)
11 (contribution and indemnity).

12 The fact that Jensen is an alleged co-conspirator with
13 Shasta County and its employees in the alleged scheme to violate
14 plaintiffs' rights does not change the analysis. In Texas
15 Industries, the Supreme Court held that there is no right to
16 contribution under the federal antitrust laws. The court
17 followed the same analysis as in Northwest Airlines, first
18 determining that Congress did not create the right in the
19 statutes and, second, that the court lacked the power to fashion
20 a federal common law right to contribution. Tex. Indus., Inc.,
21 451 U.S. at 638. It was immaterial to the Court's analysis that
22 the individuals against whom the defendant sought contribution
23 were "participants in the unlawful conspiracy on which recovery
24 was based." Id. at 632. Similarly, in rejecting the employer's
25 theory that the Equal Pay Act and Title VII provide for a right
26 to contribution, the Court "assume[d] that the plaintiffs . . .
27 could have recovered from either the union or the employer, under
28 both the Equal Pay Act and Title VII, and that it is unfair to

1 require [the employer] to pay the entire judgment." Nw.
2 Airlines, Inc., 451 U.S. at 89.

3 In Texas Industries, the Court also emphasized that the
4 federal securities statutes "were not adopted for the benefit of
5 the participants in a conspiracy to restrain trade" and that
6 defendant "'is a member of the class whose activities Congress
7 intended to regulate for the protection and benefit of an
8 entirely distinct class." Tex. Indus., Inc., 451 U.S. at 639
9 (quoting Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 37
10 (1977)). The Court raised the same point in concluding that the
11 Equal Pay Act and Title VII did not provide for contribution.
12 Nw. Airlines, Inc., 451 U.S. at 91-92. This reasoning applies
13 equally to the present case because, assuming plaintiffs'
14 allegations are true, § 1983 was intended to protect plaintiffs
15 from Shasta County's conduct, not Shasta County from injuries
16 caused to plaintiffs by Shasta County and its co-conspirators'
17 conduct.

18 In contrast to bringing a claim for contribution or
19 indemnity derived from § 1983, § 1983 defendants have sought
20 indemnification or contribution under state law claims. For
21 example, in Banks, the plaintiff was burned to death while in the
22 custody of the city jail and her representatives sued the city
23 under § 1983. Banks, 109 F.R.D. at 537. The city claimed that
24 the mattress in plaintiff's cell was defective and caused the
25 fire to spread too quickly. Id. at 537-38. Although the jail
26 could not seek contribution from the mattress manufacturers under
27 § 1983, it was able to assert third-party claims against the
28 manufacturers in the § 1983 action based on state law causes of

1 action, such as strict products liability, breach of warranty,
2 and negligence. Id. at 539-40; see id. at 540-41 (“One
3 determination that a jury might make is that the tortious actions
4 of the third party defendants are, in whole or in part,
5 responsible for the decedent’s death, and that the defendants
6 should therefore be relieved of liability to the plaintiffs to
7 that extent.”). Shasta County’s TACC does not, however, allege
8 independent state law claims giving rise to a right to indemnity
9 or contribution.

10 Accordingly, because § 1983 does not provide for a
11 federal right to contribution or indemnity and Shasta County has
12 not alleged any state law claims, the court will grant Jensen’s
13 motion to dismiss the third-party claims against him.⁶

14 E. Shasta County’s Motion Re: Mediation Confidentiality

15 In the final motion before the court, Shasta County
16 moves for an order prohibiting plaintiffs from “further
17 disclosing mediation statements and mediation briefs to third
18 parties, including the press, in violation of a Mediation
19 Confidentiality Agreement, and for an Order imposing monetary
20 sanctions against Plaintiffs and in favor of the County.”

21 (Docket No. 43 at 1:10-13.) In making its motion, Shasta County
22 invokes the “inherent power” of the court to “impose sanctions
23 upon a party and/or its counsel for bad faith litigation
24 conduct.” (Id. at 5:8-10.)

25 Shasta County incorrectly views the court’s inherent
26

27 ⁶ Because the court will grant Jensen’s motion to
28 dismiss, his motion to strike Shasta County’s third-party claims
under Rule 12(f) is moot and will be denied as such.

1 power as extending to extra-judicial conduct that has no legal
2 effect on the proceedings before the court. In Chambers v.
3 NASCO, Inc., 501 U.S. 32 (1991), the Supreme Court discussed
4 courts' inherent powers in detail, revealing a common thread that
5 the courts' inherent powers are tied to their need "to manage
6 their own affairs so as to achieve the orderly and expeditious
7 disposition of cases'" and remedy "abuses [of] the judicial
8 process." Chambers, 501 U.S. at 43-45 (quoting Link v. Wabash R.
9 Co., 370 U.S. 626, 630-31 (1962)). Even when recognizing that
10 the "power reaches both conduct before the court and that beyond
11 the court's confines," the Court justified this extension as
12 remedying "disobedience to the orders of the Judiciary,
13 regardless of whether such disobedience interfered with the
14 conduct of trial." Id. at 44.

15 Here, independent of any involvement of the court, the
16 parties agreed to mediate their case before the Judicial
17 Arbitration Mediation Service. This court had nothing to do with
18 that agreement and the parties' actions pursuant to the mediation
19 are independent of this proceeding. Remedying any alleged breach
20 of a mediation agreement occurring outside the confines of this
21 proceeding is beyond the reach of the court's inherent power.⁷
22 Further, even if it could be argued that the court's inherent
23 power extended to those mediation proceedings, this court would

24
25 ⁷ In contrast, courts have enforced mediation
26 confidentiality agreements when the documents subject to the
27 agreements are submitted to the court or offered at trial. E.g.,
28 Facebook, Inc. v. Pac. Nw. Software, Inc., 640 F.3d 1034, 1041
(9th Cir. 2011) (upholding the district court's exclusion of
evidence that was the subject of a mediation confidentiality
agreement).

1 have no interest or desire to interject itself into those extra-
2 judicial proceedings. Accordingly, the court must deny Shasta
3 County's motion for an order precluding plaintiffs from further
4 violations of the mediation confidentiality agreement and for
5 monetary sanctions.

6 IT IS THEREFORE ORDERED that

7 (1) plaintiffs' motion to remand (Docket No. 46) be,
8 and the same hereby is, DENIED;

9 (2) plaintiffs' motion for Rule 11 sanctions (Docket
10 No. 40) be, and the same hereby is, DENIED;

11 (3) plaintiffs' motion to dismiss (Docket No. 35) be,
12 and the same hereby is, DENIED;

13 (4) Jensen's motion to dismiss (Docket No. 59) be, and
14 the same hereby is, GRANTED;

15 (5) Jensen's motion to strike (Docket No. 61) be, and
16 the same hereby is, DENIED as moot; and

17 (6) Shasta County's motion for an order precluding
18 plaintiffs from further violations of mediation confidentiality
19 and for monetary sanctions (Docket No. 43) be, and the same
20 hereby is, DENIED.

21 Shasta County has twenty days from the date this Order
22 is filed to file amended third-party claims against Jensen, if it
23 can do so consistent with this Order.

24 DATED: October 10, 2012

25
26 

27 WILLIAM B. SHUBB
28 UNITED STATES DISTRICT JUDGE